

2321
No. 11905

United States
Circuit Court of Appeals
For the Ninth Circuit

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record


Upon Appeal from the District Court of the United States
for the Southern District of California
Southern Division

FILED

JUN 2 - 1948

PAUL P. O'BRIEN,

CLERK



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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	5
Appeal:	
Bond for Costs on.....	11
Notice of.....	11
Statement of Points Upon Which Appel- lant Intends to Rely Upon.....	14
Stipulation and Order for Transfer of Original Exhibits on.....	17
Stipulation Designating Parts of Record Proceedings and Evidence to Be In- cluded in Record on.....	15
Bond for Costs on Appeal.....	11
Certificate of Clerk.....	19
Complaint for Damages.....	2
Exhibit, Plaintiff's No. 3—Sketch.....	8
Judgment of Dismissal.....	9
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	11

Reporter's Transcript of Proceedings.....	20
Witnesses for Plaintiff:	
Darnell, Frank	
—direct	46
—cross	50
Tinkham, Kenneth R.	
—direct	30, 70
—cross	38, 75
—redirect	41
Tinkham, R. H.	
—direct	42, 58
—cross	60
—redirect	65
—recross	67
Statement of Points and Designation of Record (CCA) for Printing.....	80
Statement of Points Upon Which Appellant Intends to Rely Upon Appeal.....	14
Stipulation and Order for Transfer of Orig- inal Exhibits on Appeal.....	17
Stipulation Designating Parts of Record Pro- ceedings and Evidence to Be Included in Rec- ord on Appeal.....	15

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LUCE, FORWARD, LEE & KUNZEL,
1220 San Diego Trust & Savings Bldg.,
San Diego 1, Calif.

For Appellee:

JAMES M. CARTER,
United States Attorney,

REUBEN ROSENSWEIG,
Assistant U. S. Attorney,

600 U. S. Post Office & Court House
Bldg., Los Angeles 12, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern
District of California, Southern Division

No. 828—Civil

SAN DIEGO GAS & ELECTRIC COMPANY, a
Corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT FOR DAMAGES

Plaintiff complains of the defendant above named,
and for cause of action alleges:

I.

That this action is filed pursuant to and under
and by virtue of the provisions of the "Federal
Tort Claims Act."

II.

That the above named plaintiff is a corporation,
duly incorporated under and by virtue of the laws
of the State of California, with its principal place
of business in the County of San Diego, California,
and is a public utility engaged in supplying electric
energy and electric light and other energies and
commodities to the City of San Diego, to the City of
El Cajon and to the City of Escondido and other
municipalities within the County [2] of San Diego.

III.

That said plaintiff prior to the times referred to
herein had installed and had maintained during

said time and during all of the times herein referred to, transmission lines for the transmission of electricity between the City of El Cajon and the City of Escondido, and that said transmission lines between said Cities crossed over Mission Gorge, in the immediate vicinity of the Old Mission Dam in said County of San Diego; that said transmission line consisted of three wires and crossed said Gorge in a span of approximately 1700 feet, at either end of which span were placed two double pole structures and accompanying equipment, for the purpose of holding and supporting said transmission line across said Gorge.

IV.

That on or about the 5th day of September, 1945, Glen D. Ferrin was a non-commissioned officer in the United States Coast Guard, to wit, a Chief Aviation Pilot, and that he was on said date attached to the United States Coast Guard Air Station at San Diego, California, and that on said date and while he was acting in line of duty operating and flying a certain airplane belonging to the defendant herein, the said Glen D. Ferrin piloted and operated the said airplane in such a negligent, careless and reckless manner as to cause the same to crash and collide with said plaintiff's transmission line crossing said Mission Gorge, thereby injuring, breaking and damaging said transmission line and the said supporting structures at either end of the same, including the equipment and installations used in connection therewith.

V.

That as the direct and proximate cause and result of the said careless, negligent and reckless piloting and operating of said airplane as aforesaid, and the injuring and damaging of said property belonging to this plaintiff as herein alleged, plaintiff [3] was required to expend the sum of Two Thousand, One Hundred Sixty-Six and 89/100 (\$2,166.89) Dollars for the necessary repairs to said transmission line and its supporting structures, no part of which said sum has been repaid to plaintiff.

Wherefore, plaintiff prays judgment against the defendant in the sum of Two Thousand, One Hundred Sixty-Six and 89/100 (\$2,166.89) Dollars, together with Court costs.

LUCE, FORWARD, LEE &
KUNZEL

By /s/ CHARLES H. FORWARD,
Attorneys for Plaintiff.

State of California,
County of San Diego—ss.

E. D. Sherwin, being duly sworn deposes and says: That he is Vice President of the San Diego Gas & Electric Company, a corporation, the above named plaintiff, and is authorized to make this verification for and on behalf of said plaintiff corporation; that he has read the forgoing Complaint for Damages and knows the contents thereof, and that the same is true of his own knowledge, except as to

those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

/s/ E. D. SHERWIN.

Suscribed and sworn to before me, this 13th day of February, 1947.

[Seal] /s/ R. A. RUFFIN,
Notary Public in and for said County and State.
My Commission Expires May 17, 1947.

[Endorsed]: Filed Feb. 18, 1947. [4]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, by and through its counsel of record and in answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

I.

Admits each and every allegation contained in paragraphs I, II, and III of plaintiff's complaint on file herein.

II.

Admits that on or about September 5, 1945, Glen D. Ferrin was a non-commissioned officer in the United States Coast Guard, to wit, a Chief Aviation Pilot, and that he was on said date attached to the United States Coast Guard Air Station at San

Diego, California, and that on said date, while acting in line of duty, was operating and flying an airplane belonging to the defendant. Defendant denies both generally and specifically that said Glen D. Ferrin piloted and operated said airplane in such a negligent, careless and reckless manner as to cause the same to crash and collide with plaintiff's transmission line crossing Mission Gorge and thereby injuring, breaking and [5] damaging said transmission line and the supporting structures at either end of the same including the equipment and installations used in connection therewith.

III.

Defendant has no information sufficient to form a belief as to the truth of the averments set forth in paragraph V of plaintiff's complaint on file herein, and basing its denial on said grounds, denies each and every allegation thereof.

For a further, second and distinct answer and affirmative defense, this answering defendant alleges as follows:

I.

That the damage to plaintiff, if any, was caused without any fault, carelessness or negligence on the part of this answering defendant but was the result of an unavoidable accident so far as this defendant is concerned.

Wherefore, this answering defendant prays judgment as follows:

1. That the complaint of plaintiff on file herein be dismissed, and that they take nothing by virtue thereof;

2. That the defendant have its costs of suit incurred herein; and

3. For such other and further relief as the Court may deem just and proper in the premises.

JAMES M. CARTER,
United States Attorney.

RONALD WALKER and
REUBEN ROSENSWEIG,
Assistant U. S. Attorneys.

By /s/ REUBEN ROSENSWEIG,
Attorneys for Defendant.

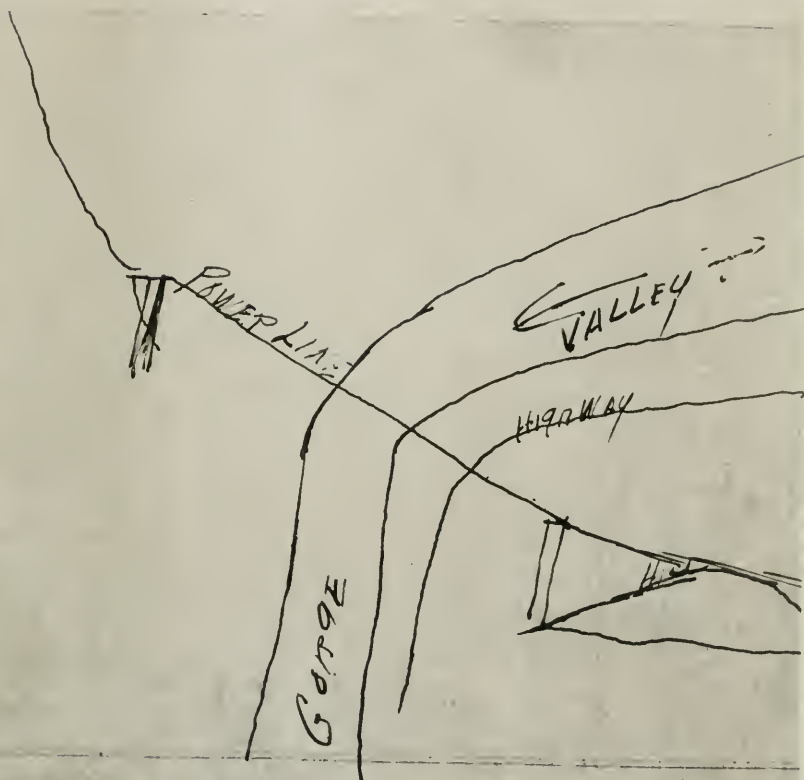
[Affidavit of service by mail attached.]

[Endorsed]: Filed Oct. 2, 1947. [6]



No. 828
FOR IDENTIFICATION
EXHIBIT No. 3
MARKED 12/9/47
By ED Hoaces, Clerk
Deputy Clerk

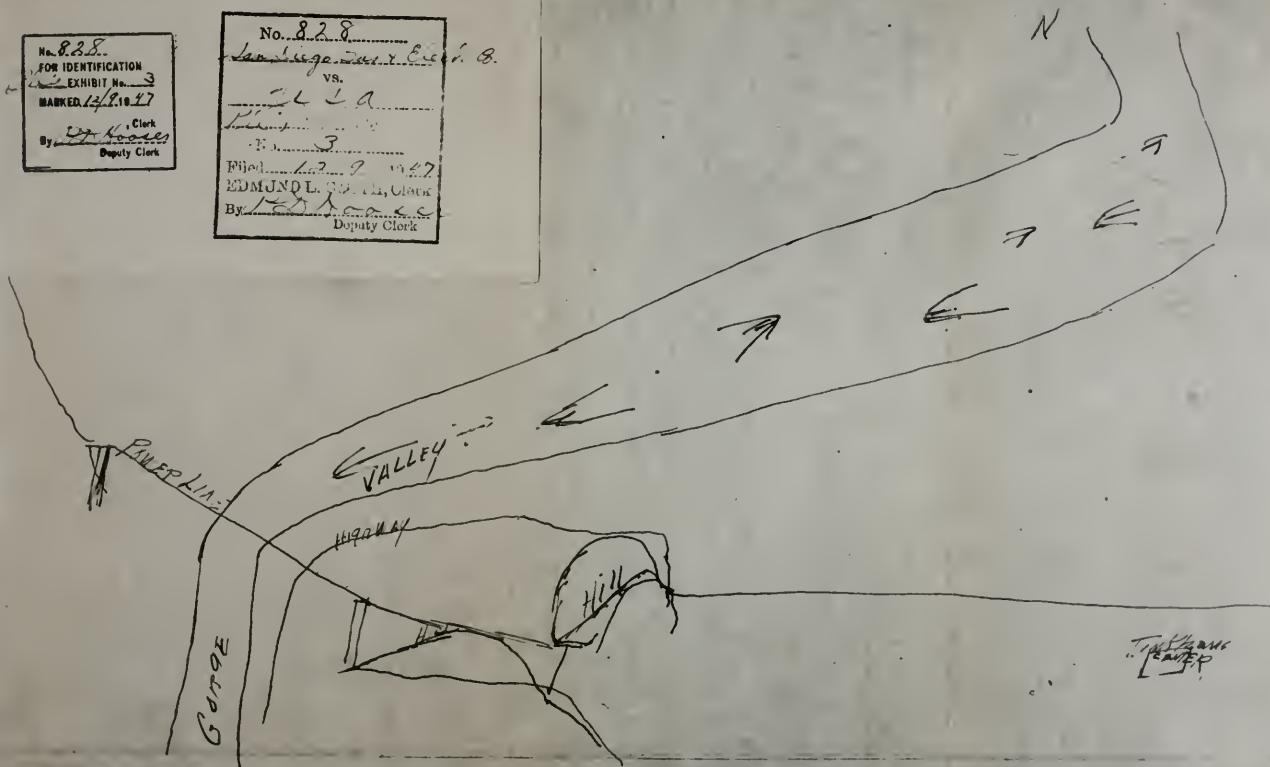
No. 828
San Diego Gas & Electric Co.
vs.
74 LA
Electric Co.
No. 3
Filed 12 9 1947
EDMUND L. SMITH, Clerk
By ED Hoaces
Deputy Clerk





No. 828
 FOR IDENTIFICATION
 EXHIBIT No. 3
 MARKED 1/3/10/27
 By W. H. Moore, Clerk
W. H. Moore, Deputy Clerk

No. 828
San Diego v. E. B.
 vs.
Ch. L. A.
Ch. L. A.
 Filed 1/3/10/27
 EDMUND L. MOORE, Clerk
 By W. H. Moore, Deputy Clerk





In the District Court of the United States in and
for the Southern District of California,
Southern Division

No. 828-SD Civil

SAN DIEGO GAS & ELECTRIC COMPANY, a
corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT OF DISMISSAL

The above entitled matter came on regularly for hearing at San Diego, California, on the 8th day of December, 1947, before the Honorable Jacob Weinberger, Judge of the above entitled Court, Luce, Forward, Lee & Kunzel by James L. Focht, Jr. appearing as attorneys for plaintiff, San Diego Gas & Electric Company, a corporation, and defendant, United States of America, appearing by its counsel, James M. Carter, United States Attorney, and Ronald Walker and Reuben Rosensweig, Assistant United States Attorneys, and the Court having heard and received oral and documentary evidence submitted and received on behalf of the plaintiff, and upon the motion of the defendant, United States of America, to dismiss, and the Court having heard oral argument of counsel and being fully advised in the premises, and it appearing to the satisfaction of the Court that plaintiff failed to establish by a preponderance of the evidence that the defendant United States of America, or any of its agents,

servants and/or employees negligently, carelessly and recklessly piloted and operated the said airplane so as to cause it to collide with the plaintiff's [9] transmission lines, and caused the damage alleged in plaintiff's complaint, and that upon the facts and the law the plaintiff has shown no right to relief.

It Is Therefore Ordered, Adjudged and Decreed that said action be and the same is hereby dismissed.

Dated: January 7, 1948.

/s/ JACOB WEINBERGER,
United States District Judge.

Approved as to Form and Substance:

LUCE, FORWARD, LEE &
KUNZEL,

By /s/ JAMES L. FOCHT, JR.,
Attorneys for Plaintiff.

JAMES M. CARTER,
United States Attorney.

RONALD WALKER,
Asst. United States Attorney.

REUBEN ROSENSWEIG,
Asst. United States Attorney.

By /s/ REUBEN ROSENSWEIG,
Attorneys for Defendant.

Judgment entered and Docketed Jan. 7, 1948.
Book 13, Page 188. Edmund L. Smith, Clerk; By
/s/ L. B. Figg, Deputy.

[Endorsed]: Filed Jan. 7, 1948. [10]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the San Diego Gas & Electric Company, a corporation, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of dismissal and the whole thereof entered in this action on the 8th day of January, 1948.

Dated: This 25th day of March, 1948.

LUCE, FORWARD, LEE &
KUNZEL,

By JAMES L. FOCHT, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed March 25, 1948. [11]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That Maryland Casualty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland and authorized to do business in the State of California, and having an office and place of business in the City of San Diego, County of San Diego, State of California, is held and firmly bound unto the above named United

States of America in the sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said United States of America, for the payment of which well and truly to be made it binds itself, its successors and assigns, firmly by these presents.

Whereas, on the 8th day of January, 1948, a judgment was entered in the above entitled proceedings;

And the appellant, San Diego Gas & Electric Company, a corporation, feeling aggrieved thereby, appeals to the United States Circuit Court of Appeals for the Ninth Circuit. [12]

Now, Therefore, the condition of this obligation is such that if the aforesaid judgment is affirmed or modified by the Appellate Court, or if the appeal is dismissed, the appellant, San Diego Gas & Electric Company, a corporation, will pay all costs which may be awarded against it on said appeal.

In Witness Whereof, the said Maryland Casualty Company has caused the foregoing instrument to be executed and its corporate seal affixed thereto by its duly authorized Attorney in Fact, at San Diego, California, this 18th day of March, 1948.

MARYLAND CASUALTY
COMPANY,

By F. F. EDELEN,
Attorney in Fact. [13]

State of California,
County of San Diego—ss.

On this 18th day of March, 1948, before me, Frederick David Corbett a Notary Public, in and for the County of San Diego, State of California, residing therein, duly commissioned and sworn, personally appeared F. F. Edelen, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Maryland Casualty Company, the corporation that executed the within instrument and acknowledged to me that he subscribed the name of Maryland Casualty Company thereto as principal and his own name as attorney in fact. I further certify that said instrument was executed by said F. F. Edelen as attorney in fact of Maryland Casualty Company in my presence, and that his signature thereto is genuine.

Witness my hand and seal the day and year in this certificate first above written.

[Seal] /s/ FREDERICK DAVID CORBETT,
Notary Public in and for said
County and State.

[Endorsed]: Filed March 25, 1948.

In the District Court of the United States in and
for the Southern District of California,
Southern Division

No. 828-SD Civil

SAN DIEGO GAS & ELECTRIC COMPANY, a
corporation,

Plaintiff and Appellant.

vs.

UNITED STATES OF AMERICA,

Defendant and Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY UPON
APPEAL

Plaintiff and appellant proposes on its appeal to
the Circuit Court of Appeals for the Ninth Circuit,
to rely on the following points as error:

1. The Court erred in granting the motion of
defendant and appellee for a dismissal of the
action of plaintiff and appellant.
2. The Court erred in failing to give the plaintiff
and appellant the benefit of the reasonable in-
ferences to which it was entitled under the
evidence.
3. The Court erred in holding that it was not
established by the preponderance of evidence
that the damage in question was proximately

caused by the negligence of the defendant and appellee's pilot.

4. The Court erred in not applying the doctrine of Res Ipsa Loquitur. [14]

Dated April 5, 1948.

LUCE, FORWARD, LEE &
KUNZEL,

By /s/ JAMES L. FOCHT, JR.,
Attorneys for Plaintiff and
Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 6, 1948. [15]

[Title of District Court and Cause.]

STIPULATION DESIGNATING PARTS OF
RECORD PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN RECORD
ON APPEAL

It is hereby stipulated and agreed by and between San Diego Gas and Electric Company, plaintiff and appellant, and United States of America, defendant and appellee, by and through their respective attorneys that the following parts of the record proceedings and evidence in said cause are hereby desig-

nated to be included and shall be included in and constitute the record on appeal in said cause:

1. Complaint.
2. Answer.
3. Judgment of Dismissal.
4. Notice of Appeal.
5. Bond for Costs on Appeal.
6. Sketch of Mission Valley and Mission Gorge (Plaintiff's Exhibit No. 3). [17]
7. All testimony and proceedings at the trial contained in the original transcript of testimony prepared by Ross Reynolds, Official Court Reporter;
8. Statement of points upon which appellant intends to rely on appeal;
9. Stipulation designating parts of record proceedings and evidence to be included in record on appeal;
10. Stipulation and order for transmission of exhibits to United States Circuit Court of Appeals for the Ninth Circuit;
11. Clerk's certificate.

It is further stipulated and agreed by said parties that no exhibits introduced in evidence during the trial of said cause in the United States District Court with the exception of the sketch of Mission Valley and Mission Gorge, plaintiff's Exhibit No. 3, need be printed; but that all the originals of said exhibits with the exception of said plaintiff's Exhibit No. 3 to be transmitted to the United States Circuit Court of Appeals may be omitted from said printed record and shall be considered a part of the

record on appeal in their original form though not printed.

Dated this 29th day of March, 1948.

LUCE, FORWARD, LEE &
KUNZEL,

By /s/ JAMES L. FOCHT,

Attorneys for Plaintiff and
Appellant.

JAMES M. CARTER,

United States Attorney.

By /s/ REUBEN ROSENSWEIG,

Assistant U. S. Attorney.

Attorneys for Defendant and
Appellee.

[Endorsed]: Filed March 30, 1948. [18]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANS-
FER OF ORIGINAL EXHIBITS ON
APPEAL

It is hereby stipulated by and between San Diego Gas and Electric Company, plaintiff and appellant, and United States of America, defendant and appellee, by and through their respective attorneys, that with the exception of a sketch of Mission Valley and Mission Gorge (plaintiff's Exhibit No. 3), copies of the original exhibits which were introduced in evidence during the trial of said cause need not be included in the record on appeal in said cause, to be filed in connection with the appeal

of said plaintiff and appellant, and that all original exhibits introduced in evidence at the trial of said cause in the above-entitled Court, excepting plaintiff's Exhibit No. 3, may be transferred and transmitted in their original form to the Court to which said appeal was taken; namely, the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the record on appeal in the above-entitled case and to be used in said appeal. [20]

Dated March 29th, 1948.

LUCE, FORWARD, LEE &
KUNZEL,

By /s/ JAMES L. FOCHT, JR.,
Attorneys for Plaintiff and
Appellant.

JAMES M. CARTER,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney.

By /s/ REUBEN ROSENSWEIG,
Attorneys for Defendant and
Appellee.

It is hereby ordered that the foregoing stipulation be and it is hereby approved, and it is so ordered.

Dated: March 29, 1948.

/s/ JACOB WEINBERGER,
Judge.

[Endorsed]: Filed March 30, 1948. [21]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 21, inclusive, contain full, true and correct copies of Complaint for Damages; Answer; Plaintiff's Exhibit No. 3; Judgment of Dismissal; Notice of Appeal; Bond for Costs on Appeal; Statement of Points Upon Which Appellant Intends to Rely Upon Appeal; Stipulation Designating Record on Appeal and Stipulation and Order re Exhibits which, together with copy of reporter's transcript of proceedings on December 8 and 9, 1947, and original Plaintiff's Exhibits 1 and 2, transmitted herewith constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$5.05 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21st day of April, A.D. 1948.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

In the United States District Court for the Southern
District of California, Southern Division

No. 828—Civil

SAN DIEGO GAS & ELECTRIC CO.,

Plaintiff,
vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Jacob Weinberger,
Judge presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff: Luce, Forward, Lee & Kunzel,
by James L. Focht, Esq., San Diego, California.

For the Defendant: Reuben Rosensweig, Assist-
ant United States Attorney.

San Diego, California
Monday, December 8, 1947

The Court: Are you ready in this case?

Mr. Focht: Yes, your Honor.

Mr. Rosensweig: Yes, your Honor. Counsel for
the plaintiff served me with a copy of his memo-
randum here and I desire at this time to file an
original and a copy of my memorandum with the
court.

The Court: I think we might proceed with the
pre-trial in this matter.

Mr. Rosensweig: I think, if counsel and I may approach the rostrum here, we can stipulate to many matters.

The Court: Yes.

Mr. Focht: If the court please, this case is brought under the Federal Tort Claims Act and alleges that a Coast Guard pilot negligently operated a plane on the 5th day of September, 1945, and as a proximate result of his negligence, his plane was caused to and did collide with a power line of the plaintiff, causing damage as set forth in the complaint.

The Court: When was this case filed? Was it in 1947?

Mr. Focht: It was filed within one year after the enactment of the Tort Claims Act. I can give you the exact date.

The Court: This accident occurred when?

Mr. Focht: September 5, 1945.

Mr. Rosensweig: The action, your Honor, was filed on February 18, 1947.

The Court: And this legislation was enacted when?

Mr. Focht: August, 1946, your Honor. [2*]

Mr. Rosensweig: The effective date of the Tort Claims Act is August 2, 1946. It is not an action that is barred by the statute.

The Court: What is the limitation?

Mr. Focht: One year after the enactment of the act or one year after the occurrence itself.

* Page numbering appearing at top of page of Reporter's certified Transcript of Record

Mr. Rosensweig: If the claim was filed with the agency involved, the extension is six month after that period.

The Court: You filed this in February, apparently, 1947?

Mr. Focht: Yes, your Honor: that is right.

Mr. Rosensweig: Yes, your Honor.

Mr. Focht: The defendant in its answer has admitted that the Coast Guard pilot named in the complaint was piloting the government plane and has admitted, further, that he was acting in the line of duty, that is, within the scope of his employment. The answer denies that the accident was caused by reason of his negligence, setting up as an affirmative defense that it was an unavoidable accident. Counsel for the government has agreed to stipulate that, if the plaintiff is entitled to recover, it is entitled to recover the amount alleged in the complaint, that is, the government has stipulated that the sum set forth in the prayer is the cost incurred by the plaintiff by virtue of the accident in question. That leaves as virtually the sole issue in the case the question of whether or not the flight in question which [3] resulted in the accident was a negligent flight and whether the government's agent was guilty of negligence.

Counsel has also agreed to stipulate that the Civil Aeronautics regulation in connection with traffic control and minimum safe altitudes, which is quoted in the plaintiff's brief, was applicable to Coast

Guard pilots and that they were bound to the same extent as civilian pilots would be bound.

Counsel has further offered to stipulate——

The Court: What are those heights?

Mr. Focht: I will read the section. It is Section 60.105.

The Court: Is that in your brief?

Mr. Focht: It is, your Honor. It is 1,000 feet over cities, towns and settlements and elsewhere 500 feet, with qualifications.

Mr. Rosensweig: With qualifications on the 500 feet, your Honor.

Mr. Focht: "Except over water or areas where flying at a lower altitude will not involve hazard to persons or property on the surface."

The Court: Where did this occur?

Mr. Focht: This occurred in Mission Valley, at the site of the old Mission dam, I would say about three to five miles this side of Santee. [4]

The Court: This would come in, then, under the 500-foot altitude height, would it?

Mr. Focht: Counsel has offered to stipulate to the height of the wires which were involved in the accident, there being three wires. The lowest wire is 187 feet above the creek bed; the middle wire, 198 feet above the creek bed, and the highest wire 210 feet above the creek bed.

Counsel has further agreed to stipulate to the introduction of several photographs recently taken on the scene. I have these photographs in my possession and perhaps the court would desire, before

proceeding with the evidence, that the photographs be received.

The Court: If it is stipulated to, they may be received.

Mr. Rosensweig: So stipulated, your Honor.

The Court: Do you mean received in evidence at this time?

Mr. Rosensweig: I think it should be for identification.

Mr. Focht: Yes; for identification.

The Court: For identification. How many photographs are there?

Mr. Focht: Two photographs, your Honor. One photograph is taken at a point approximately one mile to the east of the power lines in question. That is the long photograph, composed [5] of three segments. The smaller photographs, in two segments, was taken from a position to the west of the power lines. I am not sure of the exact footage but a matter of perhaps a hundred yards or so.

The Court: Plaintiff's Exhibits 1 and 2.

Mr. Rosensweig: I think it would be well to bring to the court's attention, and I think counsel will stipulate, that the towers on which these wires were strung—that one tower was upon land owned by the City of San Diego and the other tower was upon land leased by private individuals to the San Diego Gas & Electric Company and that the wires themselves strung between the two towers were in the public domain.

Mr. Focht: It is my understanding, your Honor, that part of the wires were across private land and part across land of the City of San Diego.

Mr. Rosensweig: That is correct.

The Court: You say part of it owned by a private individual?

Mr. Focht: That is my understanding; yes, your Honor.

The Court: Leased to the San Diego Gas & Electric Company?

Mr. Focht: Yes, your Honor; and, of course, that the proper franchise existed over the part of the land owned by the city. On the long photograph the towers and the power [6] lines appear but they appear at a great distance and it will be necessary to point out to the court where they appear. On the smaller photograph, if you look against the sky, you can see the wires. They do not stand out too clearly on the photograph.

The Court: They are in the direction or, rather, stretching from these towers?

Mr. Focht: May I approach the bench, your Honor?

(Statement, by Mr. Focht, at the bench, inaudible to the reporter.)

The Court: And, of course, on Exhibit 1 the line is in evidence there, is it not?

Mr. Focht: This is not the line. The line appears around down here. The reason for introducing this exhibit will appear when I call a witness who was standing at the vantage point from which that photograph was taken.

Mr. Rosensweig: I think counsel should make it appear that that heavy line is not the wire we are talking about.

Mr. Focht: That is correct.

The Court: Then, there was no wire when this photograph was taken?

Mr. Focht: Yes, your Honor, but the wire which is so much in evidence has nothing to do with the trial. The wire which is involved appears—or the towers appear on this hill, away down at the extreme left-hand corner. [7]

The Court: This is just——

Mr. Focht: That is a panorama of the contour of the land. There will be testimony, however, in connection with the flight of the plane.

The Court: And it isn't intended to depict a wire or the height there?

Mr. Focht: No, your Honor. It is for the purpose of illustrating certain testimony.

The Court: What about the law governing this matter?

Mr. Focht: The law, I believe, may be succinctly stated in two categories. First, it will be the contention of the plaintiff that the testimony introduced at the trial will establish the negligence of the pilot both as a matter of fact and as a matter of law and that he is negligent as a matter of law by virtue of his falling under the 500-foot minimum, and that he was negligent as a matter of fact by virtue of the nature of his flying and the fact that the accident occurred in broad daylight and the

fact that he was flying at an altitude that was a potential hazard to persons or property, regardless of the existence or non-existence of the regulation.

The next will be in connection with the doctrine of *res ipsa loquitur*. In aviation cases, it is a rather moot one.

The Court: There is no such doctrine applicable in automobile cases, is there? [8]

Mr. Focht: Normally, there isn't.

The Court: It is a question of negligence or not, is it?

Mr. Focht: That is what it is. It is our contention that, in any event, even in the absence of any testimony at all, *res ipsa loquitur* would be applicable. We do not feel that the doctrine of *res ipsa* is necessary to the case.

The Court: I doubt whether it applies in a case of this kind.

Mr. Focht: There is authority both ways. One is a New York case where an airplane collided with an automobile on the highway.

Mr. Rosensweig: I think the preponderance is against the application of *res ipsa loquitur* in airplane cases. I think the authorities, where such doctrine is made applicable, are upon a different theory, that is, the doctrine might be applicable where passengers were involved.

Mr. Focht: The broad principle is, of course, where the instrumentality is solely under the control of a certain person. And, if the accident is one that, in the normal course of events, wouldn't hap-

pen without negligence, then the happening is considered prima facie evidence——

The Court: Would it be applicable in a streetcar case?

Mr. Focht: It is applicable in the average streetcar collision case.

Mr. Rosensweig: I believe, your Honor, the cases cited [9] in the trial brief cover that matter. In the case of *Smith vs. Whitney*, 27 Southeastern (2) 442, there is a direct quotation from it to this effect: "The doctrine of *res ipsa loquitur* does not apply because any number of causes may have been responsible for the plane falling, including causes over which the pilot had no control, it being common knowledge that airplanes do fall without the fault of the pilot." You can have no better statement of the law so far as *res ipsa loquitur* is concerned than that statement there.

Mr. Focht: In California, a Supreme Court case, which is cited in my brief, has applied the doctrine to an airplane crash case. There were two planes coming in for a landing and one plane was riding behind the other plane and collided with it. Judge James, in a case decided in 1935, which is recorded in *U. S. Aviation Reports*, which I have quoted in my brief, did instruct the jury on *res ipsa* that, if they, themselves, felt, as a matter of fact, the collision was one that did not happen unless there was negligence involved, then they could apply the doctrine. In other words, he refused to say the doctrine did apply. He left it up to the jury to

determine whether the type of accident was one not compatible with a lack of negligence. Where, I believe, you have an accident that happens between a plane and a stationary ground object, in broad daylight, the doctrine is just as applicable as it would be to a case [10] of an automobile driving off the road onto private property and damaging a house or something like that. It depends on the particular set of facts. I don't believe you can generalize and say that *res ipsa* does apply to aviation cases or doesn't. I believe it depends upon the case presented.

Mr. Rosensweig: I believe the Court can take judicial notice of the fact that there have been countless numbers of airplanes here recently, where they have never determined the actual cause of the crashes themselves, the crashes having happened in broad daylight. The daylight factor does not seem to make any difference, for instance, where airplanes have crashed against the sides of mountains. An investigation sometimes merely appears to be a cleaning up of the wreckage.

The Court: Is there anything further?

Mr. Focht: Nothing further.

Mr. Rosensweig: Nothing further.

The Court: How about the trial?

Mr. Rosensweig: I think we may proceed with the trial if your Honor desires to hear it at this time.

The Court: We will take a recess.

Mr. Focht: I have but three witnesses and I do not anticipate their total testimony will take very long.

(Short recess.) [11]

(3:40 p.m., Monday, December 8, 1947.)

The Court: You may proceed.

Mr. Focht: The plaintiff will call, as its first witness, Mr. K. R. Tinkham.

KENNETH R. TINKHAM

a witness for the plaintiff, being first duly sworn,
was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Kenneth R. Tinkham.

Direct Examination

By Mr. Focht:

Q. Mr. Tinkham, when you are testifying, keep your voice up so we can all hear you.

A. Yes, sir.

Q. Where do you reside, Mr. Tinkham?

A. At the top of Mission Gorge Valley or in the Mission Valley, at the top of the Gorge.

Q. Can you orient that a little more definitely?

A. It is about three and a half miles west of Santee.

Q. Do you have some kind of a business establishment at that place?

A. Yes, sir; a service station and a small store.

(Testimony of Kenneth R. Tinkham.)

Q. How long have you had this business establishment at that place?

A. I bought it August 7, 1945.

Q. Were you at that establishment on the 5th day of [12] September, 1945? A. Yes, sir.

Q. I show you a photograph, marked Plaintiff's Exhibit 1 for identification, and ask you if you recognize the scene that that depicts.

A. Yes, sir.

Q. Were you present at the time this photograph was taken? A. Yes; I was.

Q. And from what point was this photograph taken?

A. Right in front of my service station.

Mr. Focht: I will offer Plaintiff's Exhibit 1 for identification in evidence.

Mr. Rosensweig: No objection.

The Court: It may be received.

Q. (By Mr. Focht): Returning to the 5th day of September, 1945, did you witness anything of an unusual nature on that date? A. Yes, sir.

Q. And did that episode involve an airplane?

A. Yes, sir.

Q. Did you see this airplane at any time?

A. Yes, sir.

Q. Where were you when you first saw the airplane? A. I was in my store. [13]

Q. What, if anything, first called your attention to the airplane?

A. My dad called it first. He saw the plane come through and told me about this plane coming through so low.

(Testimony of Kenneth R. Tinkham.)

Q. What did you do then?

A. I just looked out and saw it myself.

Q. In what direction, assuming, for the purposes of my question, that Mission Gorge runs in a general easterly and westerly direction—in what direction was the plane proceeding at that time?

A. Easterly.

Q. Referring to Plaintiff's Exhibit 1, can you mark with an "X" the position of the plane when you first saw it?

I will mark this "X-1."

That indicates the position of the plane when you first saw it, is that correct? A. Yes, sir.

The Court: This indicating the height where it was flying? A. Yes, sir.

Q. (By Mr. Focht): At what approximate height was the plane flying at that time, if you can give me an approximation?

A. I would say around 200 feet.

Q. The plane traveling at that time was then traveling [14] up the Valley toward your establishment, is that correct?

A. It was going up that riverbed; yes, sir.

Q. Please describe the course taken by the plane from that point on.

A. It went on up this riverbed until it come to a little raise or a hill there and it raised up over this little hill and then turned to the left and went up this canyon and, as soon as it went behind this hill, I couldn't see it any more as it went up this canyon.

(Testimony of Kenneth R. Tinkham.)

Q. Will you please mark with another "X" the point at which the plane changed its course?

The Court: Mark it with something else. This can be "X-2."

Mr. Focht: Yes.

The Witness: He went in this little valley and then he turned to the left.

Q. (By Mr. Focht): That would be in what direction?

A. North, and he went up this canyon there.

Q. Will you draw an arrow to indicate from "X-2" the direction when he turned at that point?

The Court: What does "X-2" signify?

Mr. Focht: "X-2" signifies the point at which the plane changed its course and went north up a canyon and subsequently out of sight. "X-2" is in the extreme right.

The Court: The indication is about the height that you [15] saw that, is it?

A. Yes, sir. As soon as he made this turn, then I couldn't see him any more.

Q. (By Mr. Focht): Did you again, shortly thereafter, see the same plane?

A. He was gone about five minutes and he returned the same route.

Q. Please describe in detail his route when he returned.

A. He came right back through the same place, only he was a little higher when he was at the No. 2 position. He was a little higher there as he came

(Testimony of Kenneth R. Tinkham.)

back across, and he came down about half-way down through the valley. There are trees in there. And then he went back to about the same altitude that he went on; I would say around 200 feet.

Q. What, if anything, occurred thereafter?

The Court: 200 feet from what height?

A. From these trees that are in there. They are cottonwood trees. I imagine these cottonwood trees would be 35 feet high and I figured that he was around 200 feet above these trees.

The Court: Above the trees? A. Yes, sir.

Q. (By Mr. Focht): Incidentally, were you in the service yourself? [16] A. Yes, sir.

Q. Can you describe this airplane?

A. I know that it was a Grumman. I am sure it was. It was a land and sea plane.

Q. It was a service plane? A. Yes.

Q. What, if anything, occurred thereafter?

A. Of course, it went on down out of sight to us then, and, about right after it happened, a man and a lady came in and said that a plane went down; that they were positive it went down. They must have kept right on. And my dad and Mr. Darnell were there and they were down but I didn't go down.

Mr. Rosensweig: I move this testimony the witness has just given be stricken as not responsive to the question.

Mr. Focht: I have no objection to the hearsay going out, as to what somebody else told him.

(Testimony of Kenneth R. Tinkham.)

The Court: I don't know just what was told him and what he is stating of his own knowledge. I think the entire answer may be stricken and you may proceed from there.

Q. (By Mr. Focht): Did you eventually go to the scene of the accident on that day?

A. Later on; yes.

Q. How much later?

A. Probably an hour after it happened, then I went there. [17]

Q. What did you see when you arrived?

A. I just saw the plane. It was laying on its back.

Q. Did it appear to be the plane that you had seen fly over? A. Yes.

Q. Where is your establishment with reference to any power line that crosses Mission Valley?

A. It would be about half a mile, that is, the power line would be about half a mile west of me.

Q. That would be down towards San Diego?

A. Yes.

Q. Will you examine Exhibit 1 and state whether or not you can see the towers or any of the towers of this power line? Will you please mark that position with an "X"? Do not obscure the tower itself with your "X."

The Court: "X-3," is it?

Mr. Focht: That will be "X-3," your Honor.

Q. Your "X-3" is just to the left of the tower, is that right? A. Yes, sir.

(Testimony of Kenneth R. Tinkham.)

The Court: What does that represent, "X-3"?

Q. (By Mr. Focht): It represents one of the tower lines of the power line which you have described, or one of the towers of the power line that you have described as crossing the Gorge, is that correct? [18]

A. Yes, sir.

Q. I show you a photograph, marked Exhibit 2 for identification, and ask you if you recognize the scene it depicts.

A. Yes, sir.

Q. Just state what it describes.

A. The plane would——

Q. Don't get to the plane yet but what general scene or locality does that picture portray?

A. Where this power line comes across the Gorge.

Q. Is this picture taken from the east or the west of the power line?

A. It is taken from the south.

Q. The southwest?

A. Well, right south of it. It goes around this corner to the north here and the power line should come across the road right there.

Q. Do you see the power line appearing against the sky background?

A. Yes, sir.

Mr. Focht: I will offer this as the plaintiff's second exhibit.

The Court: What does this show?

Mr. Focht: That shows the power line crossing the Gorge, a picture taken from the other side from that shown in Plaintiff's Exhibit 1. [19]

(Testimony of Kenneth R. Tinkham.)

The Court: With these two towers we see on the left-hand side of this picture, is that correct?

Mr. Focht: That is correct.

Mr. Rosensweig: May I interrupt, your Honor, and ask counsel a question.

The Court: Yes.

Mr. Rosensweig: How far was this photograph taken from the power line?

Mr. Focht: That I am unable to state.

Q. Where with reference to the power line and wires did you observe the plane when you did arrive at the scene about an hour afterwards?

A. Well, probably 300 feet south of the power lines; maybe more than that. I wouldn't say for sure now. It could be three to five hundred feet south of the power lines.

Q. Where with reference to the center of the Gorge or to the two side towers?

A. The center of the Gorge; the plane was in the center of the Gorge; right in the center of the Gorge.

Q. Did you observe any damage to the power lines or towers? A. No, sir; not at that time.

Q. Did you at any later time?

A. Yes; I saw where they were spiced right there where they are supposed to have hit. [20]

The Court: Was the line suspended or was it on the ground?

A. At the time I was there, I believe it was being repaired, your Honor. I couldn't get down

(Testimony of Kenneth R. Tinkham.)

there for an hour afterwards and I really didn't pay any attention to the line.

The Court: When you say you didn't see when it was spliced—was it being spliced?

A. No. It is spliced now.

The Court: When you saw it, was it down or up?

A. It was up.

The Court: It was spliced then, was it?

A. Yes; but I don't remember seeing it that day.

Mr. Focht: Counsel isn't making any issue of whether the plane crash caused the damage. It is stipulated the plane crash caused the damage, the amount of which is stipulated. You may cross-examine.

Cross-Examination

By Mr. Rosensweig:

Q. Mr. Tinkham, how long have you resided up in the area where you reside?

A. August 13, 1945, I moved there.

Q. Have you seen lots of airplanes fly in and out of that Valley? A. Yes, sir.

Q. Did I hear you testify you were formerly a pilot [21] yourself?

A. Yes, sir. Well, I am not a pilot but I was in the service.

Q. You indicated on your direct examination that, when you first observed the airplane in question as it came into the Valley, you saw it at a height of about 200 feet, is that correct?

A. That is right, sir.

(Testimony of Kenneth R. Tinkham.)

Q. How long did you notice it at that particular level?

A. It stayed pretty much to that level going out until it raised up to go over that little knoll.

Q. When it raised up to go over that knoll, how high did it get?

A. I don't believe it cleared the knoll over 200 feet because, as soon as it went around behind, I couldn't see it.

Q. How high is the knoll?

A. From the riverbed, the raise he would have to make?

Q. Yes. A. Well, it is probably 100 feet.

Q. The knoll being 100 feet, he was 200 feet above it, is that correct? A. That is correct.

Q. That would make 300 feet?

A. That is 300 feet. He raised enough to clear this.

Q. You indicated, Mr. Tinkham, as he came back and he [22] flew over certain trees, he was about 200 feet above the trees, is that correct?

A. Yes, sir.

Q. How high were the trees?

A. About 35 feet.

Q. In other words, that would make a total of over 235 feet above the ground?

A. That is about it.

Q. You saw the plane coming into the valley and you saw it traveling at a height of about anywhere from 235 to 335 feet, and then it disappeared around a knoll? A. Yes, sir.

(Testimony of Kenneth R. Tinkham.)

Q. What did you do after it disappeared around a knoll? A. We sat down on a car fender.

Q. What were you waiting for?

A. We were just sitting there talking.

Q. How long was the plane gone?

A. I would say around five minutes.

Q. You have lived up in this area since when?

A. The fall of 1945.

Q. 1945? A. Yes.

Q. In other words, you have lived there for about five years? A. No; three years. [23]

Q. Do you know if there is an emergency landing field up in that area, Mr. Tinkham?

A. The Gillespie airport.

Q. How far is that emergency landing field from the point where this accident occurred?

A. Three miles.

Q. How fast would you say this plane was going at the time you first observed it?

A. 125 miles an hour.

Q. It wouldn't take him very long to arrive at that emergency landing field, would it?

A. No, sir.

Q. Can you describe the emergency landing field, whether it is a large one or small one?

A. It was used as a Marine paratrooper training base. It has two long runways.

Q. In other words, it has been used on several occasions for emergency landing, has it?

A. It could be used; yes, sir.

(Testimony of Kenneth R. Tinkham.)

Q. Have you ever seen any planes land on it?

A. Yes, sir.

Q. On many occasions you have seen planes land when they got into difficulties, is that correct?

A. No.

The Court: Is there any question about Gillespie Field [24] having been used as a landing field.

Mr. Focht: I don't know anything to the contrary, your Honor.

The Court: It has been used and was at that time as an emergency landing field, is that correct?

Mr. Rosensweig: That is my understanding.

Mr. Focht: In addition to other uses. That was not its sole use.

The Court: Go ahead.

Mr. Rosensweig: That is all.

Redirect Examination

By Mr. Focht:

Q. I have several questions I should have asked on direct examination. About what time did this occur?

A. It was in the afternoon; I couldn't say as to the time; about 2:30 or 3:00 o'clock or something like that.

Q. What was the condition of the weather?

A. It was a clear day.

Q. At any time, while you observed this airplane, did you observe anything unusual about the sound of its motor? A. No, sir.

(Testimony of Kenneth R. Tinkham.)

Q. Based upon your knowledge of airplane motors and their sounds, it was normal, was it?

A. Normal.

Mr. Focht: Nothing further. [25]

Mr. Rosensweig: No questions.

Mr. Focht: Thank you, Mr. Tinkham. We will call Mr. Tinkham, Sr., Mr. R. H. Tinkham.

R. H. TINKHAM

a witness for the plaintiff, being first duly sworn,
was examined and testified as follows:

The Clerk: Will you state your name, please?

A. R. H. Tinkham.

Direct Examination

By Mr. Focht:

Q. Where do you reside, Mr. Tinkham?

A. I am at the present time residing in Lakeside Park.

Q. And that is in San Diego County?

A. Yes; it is.

Q. Are you related to the witness who has just testified, Mr. K. Tinkham? A. Yes.

Q. And what is the relationship?

A. I am his father.

Q. Where were you on the afternoon of September 5, 1945?

A. I was at his place of business.

(Testimony of R. H. Tinkham.)

Q. And that is the place of business that he has described as being some three miles or so this side or west of Santee, is that correct? [26]

A. That is right.

Q. Were you in company with anyone else that afternoon? A. A boy.

Q. Refreshing your recollection, Mr. Darnell?

A. Mr. Darnell; yes, sir.

Q. Did you witness anything of an unusual nature that afternoon?

A. I just saw the plane, is all.

Q. Where was this plane when you first saw it?

A. When I first saw it, it was just coming over the hill from San Diego towards Mission Gorge.

Q. Can you estimate its approximate altitude above the earth when you first saw it?

A. That would be hard to do because there were hills in the way and I couldn't see.

Q. Describe its course from that point on.

A. It dropped down into that Mission Gorge and finally came out at the other end of it.

Q. When you first saw it, it was traveling up the Valley, that is, coming from San Diego towards Santee? A. It was.

Q. And then it went up the Gorge and disappeared and went out of sight, is that right?

A. That is right. [27]

Q. When it was coming up the Valley, did it pass in front of you? A. It passed here.

Q. Out north of the building there?

A. Yes.

(Testimony of R. H. Tinkham.)

Q. It passed north of your son's establishment, is that right? A. Yes, sir.

Q. How far is your son's establishment from the power line that crosses the Gorge?

A. I would say between half and three-quarters of a mile. It is hard to tell.

Q. As it was coming up the valley and passed to the north of the store, could you estimate its approximate altitude above the floor of the valley?

A. I should think about 200 feet.

Q. After the plane disappeared to the north, did you again see it? A. Yes, sir.

Q. How soon after it disappeared did you see it again?

A. Well, I should think about five minutes.

Q. Where was it when you saw it?

A. It turned around and was coming back down Mission Valley again.

Q. As it came down Mission Gorge towards San Diego, can [28] you estimate its approximate height above the floor of the valley?

A. I think it was practically the same, about 200 feet.

Q. At any time while the plane was in your sight, did you hear anything unusual about the noise of its motor? A. No; I did not.

Q. What time approximately was it when you saw this plane?

A. Oh, it was about the middle of the afternoon.

Q. What kind of a day was it?

A. A clear day.

(Testimony of R. H. Tinkham.)

Q. What occurred after you saw the plane on this second occasion?

A. Well, it went down the valley and started up the canyon again.

Q. When you say started up the canyon, in what direction? A. Towards San Diego.

Q. Then what occurred?

A. Well, it disappeared out of sight and a couple, a man and his wife, came in and said they were sure that plane went down over there.

Mr. Rosensweig: I move that answer be stricken as not responsive.

The Court: It may be stricken. [29]

Q. (By Mr. Focht): After the plane went out of sight, did you go anywhere?

A. I went down to where it fell.

Q. How long after the plane went out of sight was it that you went down there?

A. I think I was there five minutes at least after it fell; not any more than five minutes.

Q. What did you observe when you went down to where you went?

A. The plane was lying on its back in the middle of the canyon.

Q. Where with reference to the point at which the power line crosses the Gorge?

A. Towards San Diego.

Q. How far from the place where the power line crosses?

A. Just estimating it, I would say 400 feet.

(Testimony of R. H. Tinkham.)

Q. Did you go down to the plane?

A. We drove down as far as we could along the road and then walked down.

Q. Did you examine the plane?

A. No; I did not.

Q. Did you make any kind of an observation of the power line equipment?

A. I see a line was broken and the line laid on the side of the road. [30]

Q. Can you say whether that was the lower or middle or the upper line?

A. I couldn't say.

Mr. Focht: You may cross-examine.

Mr. Rosensweig: No questions.

Mr. Focht: Mr. Darnell.

FRANK DARNELL

a witness for the plaintiff, being first duly sworn,
was examined and testified as follows:

The Clerk: Will you state your name, please.

The Witness: Frank Darnell.

Direct Examination

By Mr. Focht:

Q. Where do you reside, Mr. Darnell?

A. San Diego; 4222 Cherokee.

Q. Are you employed at the present time?

A. Yes, sir.

Q. Where are you employed?

A. At Consolidated.

(Testimony of Frank Darnell.)

Q. That is the Consolidated-Vultee here, is it?

A. Consolidated-Vultee.

Q. How long have you lived in the San Diego area?

A. 25 years.

Q. Are you familiar with the establishment of Mr. Tinkham's up in Mission Gorge? [31]

A. Yes, sir.

Q. Were you in the vicinity of that establishment in the afternoon of September 5, 1945?

A. Yes, sir.

Q. Were you in the company of Mr. Tinkham, Jr., and Mr. Tinkham, Sr., on that afternoon?

A. Yes, sir.

Q. Did you observe anything of an unusual nature that afternoon?

A. I saw a Grumman Widgeon approximately 200 feet off of the terrain.

Q. Grumman Widgeon is——

A. It is a two-motored airplane or a two-engined airplane, I should say.

Q. When you first saw this airplane, where was it with reference to Mr. Tinkham's establishment?

A. North of his establishment approximately 300 yards.

Q. And it was going in a direction toward or away from San Diego?

A. Going east, away from San Diego.

Q. Flying at about 200 feet at that time?

A. Approximately; yes, sir.

(Testimony of Frank Darnell.)

Q. Where did the plane go after you first saw it?

A. The plane went east perhaps a half a mile or better and turned north. It turned north behind a little [32] raise there, which is not very high, and went up that way and went out of sight.

Q. Did you again see the airplane?

A. The airplane returned not long after that and flew back through the valley.

Q. When it flew back through the valley, did it pass in front of or to the north of Mr. Tinkham's establishment?

A. North and in front of the establishment?

Q. What was its approximate altitude at that time?

A. He came back to approximately the same altitude.

Q. About 200 feet above the terrain?

A. Yes, sir.

Q. Then what, if anything, occurred?

A. He turned south through the Gorge and then it was out of sight.

Q. After it went out of sight, did you have occasion to go to the scene of the power line that crosses the Gorge?

A. Yes, sir.

Q. Did you go in anyone's company?

A. Mr. Tinkham, Sr.

Q. About how long after the plane went out of sight did you depart for the scene of the power line?

A. Not over three minutes.

(Testimony of Frank Darnell.)

Q. What, if anything, did you observe when you went to this point? [33]

A. I observed this aircraft laying on its back.

Q. Where with reference to the power line?

A. South, and in the middle of the Gorge, about 200 yards.

Q. Did you go down and examine the plane?

A. Yes, sir.

Q. What, if anything, did you observe?

A. There was a man walking around the ship at the time, and I heard he was involved in the crash, and I asked him if he was and he said no, and I looked in the ship and couldn't see anyone, and I was under the impression that he was. And then I examined the plane more carefully and I saw where I could see one fellow's arm right down in the nose. And I said to this gentleman—I didn't get his name—I wondered if they were still alive and I felt of this fellow's arm but there was no pulse.

Q. Were you there when the occupant or occupants were removed from the plane?

A. No; I wasn't. And as soon as the Navy came down, they asked everyone to leave the territory.

Q. During any time when you saw this airplane in flight, did you observe anything unusual about the noise of its engine or engines?

A. No. The aircraft was in fine condition as it went by both times, as far as I could tell. [34]

Mr. Focht: You may cross-examine.

(Testimony of Frank Darnell.)

Cross-Examination

By Mr. Rosensweig:

Q. Mr. Darnell, you indicated that this was a Grumman Widgeon? A. Grumman Widgeon.

Q. Will you describe what kind of a plane that is?

A. It is a two-engined airplane; two Pratt and Whitney engines I believe they are.

Q. How closely did you examine that airplane when you went down?

A. Very closely. However, I didn't look at the name plate to determine it was a Grumman Widgeon. I determined that when it went over.

Q. You couldn't be mistaken about that, could you?

A. Not as far as it being a Grumman Widgeon.

Q. Where did you indicate you worked?

A. At the Consolidated.

Q. You are pretty well acquainted with planes, aren't you? A. Fair. My work is motor work.

Q. In other words, you are able to determine the speed of airplanes in flight and all that sort of thing?

A. No; but you can estimate anything from a mile to a hundred. [35]

Q. Are you able to estimate speeds, generally speaking, of airplanes? A. Yes.

Q. Are you able to estimate at this time how fast the plane was going at the time this accident was involved?

(Testimony of Frank Darnell.)

A. I would say he was doing a little better than a hundred; 120.

Q. 120 miles an hour? A. Yes, sir.

Q. After the plane disappeared around this knoll, how long was it gone?

A. On its flight east?

Q. Yes; on its flight away from Mr. Tinkham's place of business. A. Three to five minutes.

Q. Did you wait for it to come back?

A. No, sir. We were sitting in front of Mr. Tinkham's establishment talking at the time and we saw it as it came back, and I made the remark then that that plane was sure flying awfully low through that area.

Q. You have seen planes fly up that Gorge dozens of times, haven't you? A. Yes, sir.

Mr. Rosensweig: No further questions.

Mr. Focht: Nothing further. Counsel for the Government [36] has offered to stipulate that the plane involved in the accident had been dispatched and was operated from the Coast Guard Air Station here on San Diego Bay. Is that correct?

Mr. Rosensweig: That is correct. It was dispatched from San Diego here and was on a regular routine training flight.

Mr. Focht: The plaintiff rests, your Honor.

Mr. Rosensweig: At this time, your Honor, the Government would like to make a motion to dismiss for the reasons set forth in the trial brief that we have just filed, on the grounds that the complaint

heretofore filed by the plaintiff, and paragraph 4, particularly, alleges that "Ferrin piloted and operated the said airplane in such a negligent, careless and reckless manner as to cause the same to crash and collide with the plaintiff's transmission line."

I submit, your Honor, that, from the testimony of these three witnesses, there is not one iota of testimony or evidence presented that the pilot of this plane operated the plane in a negligent, careless and reckless manner. The plaintiff, before it can be permitted to recover, must show by a preponderance of the evidence that the pilot was guilty of negligence and that he operated that plane in a careless and negligent manner. I submit that none of the testimony of the three witnesses indicated, in any way, shape or form, that such was the situation. They merely testified that this plane [37] proceeded up the valley at a particular height. The height has been varied here from 235 feet to 335 feet, I believe. We submit that an airplane, traveling in an open and sparsely settled country of that character, is not bound, under the regulations as herein indicated, to travel at an altitude of 500 feet.

Section (b), and I am reading, your Honor, from page 2 of the plaintiff's trial brief, says, "(b) When elsewhere than as specified in paragraph (a), at an altitude of not less than 500 feet, except over water or area where flying at a lower altitude will not involve hazard to persons or property on the surface." I submit, your Honor, that, if you will examine the photographs — a camera taking that

particular photograph has been unable to show with clarity, in any way, shape or form, that those wires were strung across that Gorge and that was the particular reason I asked how far back from the wires was Exhibit No. 2 taken, and I received no answer; they didn't know. Exhibit No. 2, assuming that it was taken practically upon the wires themselves, shows them very, very faintly in there. It is almost an impossibility to say those wires were there.

They say this accident happened upon a clear day and, under the circumstances, they should have been able to see the wires. I submit that a photograph that was taken comparatively close to the towers themselves, and the photograph it appears was taken extremely close, Exhibit 2, I believe, [38] was unable to discern the wires, and I can't understand how the human eye, flying in an airplane, could discern the wires.

The only basis I can see, your Honor, upon which the plaintiff can recover is upon the theory of *res ipsa loquitur* and we discussed that here a while ago. I am satisfied that the authorities are more than ample that the mere happening of this accident is no proof that the pilot was guilty of negligence because the authorities are clear that the doctrine doesn't apply because there are any number of reasons why an airplane will fall. I think the Court can take judicial notice of the fact that here recently we had a terrific airplane accident, where some 52 passengers were killed. A fire broke out in the

tail of that particular plane. It was unexplained and nobody happens to know how that fire actually started. It is a different situation than this particular case because there you had the question of liability of an airplane company to its passengers. In that particular case, the doctrine might apply because passengers were being carried.

I think this case is analogous to an accident that happens upon the highway, where it is unexplained. I say that this accident falls within that same category. It might be said that the plaintiff in this case might have been guilty of contributory negligence if we want to draw our own conclusions from a particular state of facts because, in constructing those [39] towers, the company could just as well have put them underground. But, in constructing them above the ground, they could equally as well have anticipated that there were thousands of airplanes flying in and about San Diego and, in constructing those wires, that they could have anticipated that such a situation might occur and that an airplane might get into trouble; that an engine might fail or almost anything might happen to it.

I am not an airplane enthusiast and know little or nothing about them but I do know there are things that happen to airplanes that are absolutely unexplainable.

So, under those circumstances, your Honor, with the situation being that the doctrine of *res ipsa loquitur* does not apply — I am convinced that it doesn't apply by reason of the great weight of au-

thority, the burden falling upon the plaintiff to show by a preponderance of the evidence that this pilot was guilty of negligence and carelessness and the unlawful operation of the plane. He has failed to show that by the preponderance of evidence required under the law and this case must be dismissed. There isn't a witness who has testified yet how high the plane was flying in the vicinity of this power line. They said the plane disappeared.

Mr. Focht: If the Court please, the power line can be pointed out on Plaintiff's Exhibit 1, the tower of the power line. This is the tower, one of the towers, that crosses the [40] valley, the other tower being over on this side, and this is the point this was taken, at the point at which the witnesses Tinkham and Darnell were standing. So it shows that the plane must have barely been out of sight because one of the towers is visible. And the testimony is the power line is from one-half to three-quarters of a mile from the point at which the Tinkhams were standing and, therefore, when the accident occurred, it must have been almost instantaneous.

The Court: Suppose the plane had dropped on this power line. Suppose it was up 1,000 feet and had dropped. Nobody seems to have followed the airplane to where the accident occurred.

Mr. Focht: That, coupled with the stipulation it was the plane involved in the accident, and that they immediately left for the scene or about five

minutes after the plane had disappeared from view, and the plane was there on the ground—the inference or the fact is inescapable that it did not turn around and come back.

The Court: There is no question but what the plane hit the power line. But how high was the plane above the power line? No one is being tried for a violation of an ordinance or the aeronautics rules.

Mr. Rosensweig: There is testimony in the record that the plane was 235 feet or 335 feet—above what? How do I know and how does this Court know that the place of business [41] of the Tinkhams wasn't four or five hundred feet above the level ground itself?

The Court: Assuming that the plane was flying 200 or 235 or 335 feet from where these witnesses saw the plane, they all said that the plane came back and then disappeared and then, a few minutes later, they heard about this crash; that somebody told them about it. They didn't even hear the crash. No one has told us how high the plane was flying at the time of this crash. It might have flown a few feet or might have flown a hundred feet above where the crash occurred. Can I assume from the evidence that the plane was flying low at this particular point; that it was flying low at the point where the impact was?

Mr. Focht: Certainly, your Honor, it is the more reasonable inference to draw than any other inference that can be drawn.

The Court: It is up to you to prove your case not by inference but by facts.

Mr. Focht: May we recess at this time until tomorrow morning, your Honor?

The Court: Yes. I would like to hear further from you. I am not pre-judging the case but it seems to me you will have to meet the issue squarely of the position of the plane at the time of the impact, if you can. We will take a recess until tomorrow morning at 10:00 o'clock. [42]

(Whereupon, a recess was taken until 10:00 o'clock a.m., Tuesday, December 9, 1947.) [43]

San Diego, California,
Tuesday, December 9, 1947, 10:00 A.M.

(Case called by clerk.)

Mr. Rosensweig: Ready to proceed in that matter.

Mr. Focht: Ready. If the Court please, at this time I will ask leave to reopen the plaintiff's case to ask a very few more questions from two of the plaintiff's witnesses who have already testified. Counsel has stated he has no objection and I don't think we will take long.

The Court: Very well.

Mr. Focht: Mr. Tinkham, Sr.

R. H. TINKHAM

a witness on behalf of the plaintiff, being previously duly sworn, was recalled and testified further as follows:

Direct Examination

By Mr. Focht:

Q. Mr. Tinkham, you testified on direct examination yesterday that, when you saw the plane come back to the north of your son's establishment, headed towards San Diego, it entered the Gorge and passed out of your vision and that shortly thereafter you departed for the scene of the power line that crosses the Gorge. Now, after the plane came into your vision on that occasion, in what direction did you look up till the time that you set out for the scene of the power line? [44]

Mr. Rosensweig: I object to that question, your Honor, as being incompetent, irrelevant and immaterial. It is a compound question and I don't believe that it is proper redirect examination.

The Court: Will you repeat that, please?

(Question read by reporter.)

Mr. Focht: I will withdraw the question and reframe it.

Q. Mr. Tinkham, from the time the plane passed out of your vision headed towards San Diego, until you left your son's establishment to go to the power line, in what direction did you look?

A. I was watching for it to come out of the Gorge.

(Testimony of R. H. Tinkham.)

The Court: That wasn't an answer to your question, was it?

Mr. Focht: Yes, your Honor.

Q. By that do you mean you were looking in the direction of the Gorge? A. Yes.

Q. From your vantage point where you were standing at your son's establishment, could you have seen the plane if it did come up out of the Gorge?

Mr. Rosensweig: I object to that question as being incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

The Court: The objection is sustained. [45]

Q. (By Mr. Focht): Did you see the plane come out of the Gorge at any time before you left for the scene of the power line? A. No, sir.

Q. Where is the east entrance of the Gorge with reference to the power line? Is the question clear? Where does the Gorge begin with reference to the power line?

A. Well, practically where the uower line is, you might say; maybe a little bit before that but right in there.

Q. Do you mean that the power line crosses the Gorge at or near the east end of the Gorge?

A. Just about there; maybe a little bit—it may run down a little bit further but not to amount to anything.

Q. Do you mean the entrance may run a little to the west or east? A. East.

(Testimony of R. H. Tinkham.)

Q. How long after the plane disappeared into the Gorge was it before you started out for the power line?

A. Oh, I should think between one and two minutes.

The Court: One or two minutes?

A. Some place in there.

Mr. Focht: Nothing further.

Cross-Examination

By Mr. Rosensweig:

Q. Mr. Tinkham, you say you started for the power line [46] one or two minutes after the airplane disappeared from your sight, is that correct?

A. That is it.

Q. Did you hear any explosion?

A. No, sir.

Q. Did you hear any impact? A. No, sir.

Q. Did you hear any noise of any nature or description that would compel you to have started from your son's establishment to the power lines in question here in one or two minutes?

A. I didn't hear any explosion; no.

Q. What compelled you to go to the power lines in one or two minutes?

A. The party that drove in there said they were positive that the plane crashed.

Q. Didn't you testify yesterday you didn't start for the scene of the power lines until five or ten minutes after the people had come to your son's

(Testimony of R. H. Tinkham.)

establishment and told you that there had been an accident down at the power lines?

A. I don't think so.

Q. How far is your son's establishment from these power lines?

A. I should say between half and three-quarters of a mile. [47]

Q. Didn't you walk? A. No, sir.

Q. You drove? A. Yes, sir.

Q. What kind of a car did you use?

A. Mr. Darnell's car.

Q. You followed Mr. Darnell's car?

A. No; I rode with him.

Q. You rode with him? A. Yes, sir.

Q. When you arrived at the scene of the accident, were the wires up or down?

A. I didn't understand you.

Q. When you arrived at the scene of the collision, were the power lines up or down?

A. They were down.

Q. Had they been spliced yet? A. No.

Q. They were still down on the ground?

A. Yes, sir.

Q. Had any other parties arrived when you arrived there? A. There was one man there.

Q. Do you know who he was?

A. All I know, he was dressed as an aviator. [48]

Q. He was dressed as an aviator? A. Yes.

Q. Did you inquire who he was? A. No.

Q. Do you know what kind of uniform he wore?

A. No; I wouldn't say that.

(Testimony of R. H. Tinkham.)

Q. Was he a member of the military forces of the United States? A. Yes, sir.

Q. He was already there? A. Yes, sir.

Q. How long after you arrived at the scene of the accident did the members of the military forces arrive and tell you to get out of the area?

A. Quite a while. I couldn't say exactly. I should think about a half-hour later. It might have been longer.

Q. How far is it, again, from your son's establishment to the power lines in question?

A. Half to three-quarters of a mile. That is my estimate of it.

Q. And, after the plane had passed your son's establishment, you lost sight of it, isn't that correct?

A. Yes, sir; after it went up the Gorge we lost sight of it.

Q. You lost sight of it? [49] A. Yes.

Q. And you didn't see it after that?

A. No.

Mr. Focht: That is all.

The Court: Just a minute. Was your vision pretty good that day? A. Yes, sir.

The Court: How far could you observe this plane as it was up in the air? How many miles would you say the plane was in sight at any time that you saw it, at the farthest point from where you were standing or sitting?

A. Well, when it went up the Gorge and went up over the hill, I should think it would be probably

(Testimony of R. H. Tinkham.)

a couple of miles away when it went out of sight.

The Court: When you say it was going up the hill——

A. When it went up over the hill and turned out of our sight and turned around came back again.

The Court: You could see it two miles away?

A. I should think so.

The Court: When it was going in the other direction towards San Diego, that was just before the plane turned around, is that correct?

A. That was when it first came over. It came over and came up the Gorge and then up the valley and then went up over this hill and turned around and went out of sight over [50] that hill and turned around and came back.

The Court: In which direction was it going when it came back?

A. After it got down in the valley, it was going west.

The Court: Going towards San Diego?

A. Yes.

The Court: As it was going towards San Diego, how far could you see the plane before it disappeared?

A. When it went up the gorge, about half or three-quarters of a mile away.

The Court: Why couldn't you see it farther than that? A. Because there was hills between.

The Court: So that is why it disappeared?

A. Yes, sir.

(Testimony of R. H. Tinkham.)

The Court: Did it go up and go over the hills?

A. No; it went on up the Gorge. The hills are—you come down the valley and turn to go up that Gorge and there is a hill on the side of it.

The Court: How high would you say that hill was from the level of the ground, in the immediate vicinity of the hills?

A. Will you repeat that question?

(Question read by reporter.)

A. Well, right where it went out of sight, it isn't—I don't think it would be a hundred feet but, after it come up the canyon, it went up to four or five hundred feet probably. [51]

The Court: Which hill are you talking about when it disappeared from sight, the short hill or what?

A. The short hill, the hill that is between this canyon and my son's place.

The Court: Then, he could go over the hump by traveling at the height that you say he traveled and go over the top of that hill, could he?

A. No; I don't think he could.

The Court: What is your judgment as to the height that he had to travel to get over that hill before he disappeared from sight?

A. He didn't come over that hill to go out of sight. He followed around to the side of that hill and started up the Gorge.

The Court: Maybe I don't understand your testimony.

(Testimony of R. H. Tinkham.)

Mr. Rosensweig: May I ask him about it, your Honor? I show you, Mr. Tinkham, Plaintiff's Exhibit No. 1. Will you show me any hill in that picture that is under 500 feet high?

Mr. Focht: You might ask him if he has oriented the picture.

Q. (By Mr. Rosensweig): You recognize the picture, don't you?

A. I just saw it here yesterday. [52]

Q. You are acquainted with the hills that appear in the picture, are you?

A. I can't say that I am.

Mr. Rosensweig: I withdraw the question, then, your Honor.

Q. Mr. Tinkham, the fact remains, does it not, that, once after this airplane passed your son's establishment to go up the Gorge towards San Diego, once it passed you, you didn't see it thereafter?

A. No, sir.

Mr. Rosensweig: That is all.

Redirect Examination

By Mr. Focht:

Q. Just a moment. Mr. Tinkham, can you state approximately how far the position in which the plane left your view was from the power line? Is that question clear?

Mr. Rosensweig: Just a moment——

Q. (By Mr. Focht): Is the question clear?

A. I think it is.

(Testimony of R. H. Tinkham.)

Mr. Rosensweig: I object to the question as calling for a conclusion of the witness and as incompetent, irrelevant and immaterial.

The Court: What is the question?

(Question read by reporter.)

The Court: I don't think I understand the question myself. [53]

Mr. Focht: The question, your Honor, I am asking him is the position at which the plane left his vision, that is, when it went around the hill say a certain distance from the power line. In other words, how far would the plane have traveled from the time it went out of his sight until it reached a position even with the power line.

The Court: The position in which it disappeared from view?

Mr. Focht: In other words, how far would the plane have traveled after it left his vision until it reached a position even with the power line.

The Court: If he knows.

Do you know how far it is from the point where you say the plane disappeared to where the power line is?

Q. (By Mr. Focht): Your best approximation, if you have one.

A. I should say around 400 feet. I am not going to say that is exact. It might have been 300 or it might have been 600 but I would figure around 400 feet.

(Testimony of R. H. Tinkham.)

The Court: You don't know, though, do you?

A. No; I couldn't swear to it.

Mr. Focht: I have no further questions.

Mr. Rosensweig: I have no further questions.

Or might I ask the witness an additional question, your Honor?

The Court: Yes. [54]

Recross-Examination

By Mr. Rosensweig:

Q. After the airplane left your vision and you lost track of it, you don't know what it did after that, do you?

A. No; I don't know what it did.

Q. You don't know whether it flew around for 10 or 15 minutes thereafter or two or three minutes, do you?

A. I know it didn't fly five minutes.

Q. In other words, for five minutes you don't know what the plane did? In other words, after it disappeared from your vision, you have no idea what the plane did?

A. Till we got there; no.

Mr. Rosensweig: That is all.

The Court: I think you testified yesterday that you got there in about five minutes?

A. Well, as near as I could tell; yes. It was inside of five minutes.

The Court: You said yesterday, I think, that you were there about five minutes after the plane fell?

A. Yes.

(Testimony of R. H. Tinkham.)

The Court: Did you know that the plane had fallen at all until you were told about it?

A. Not until—well, I was stopped from answering that question yesterday—not until that party come and told me the plane had fell. [55]

The Court: That is the only way you knew it?

A. That is the only way I knew it.

The Court: Let me have that exhibit again. What does “X-1” represent?

Mr. Focht: May I approach the bench?

The Court: Yes.

Mr. Focht: I think I can recall that. “X-1” represents the position at which Mr. Tinkham, Jr., first saw the plane as it was coming up the valley away from San Diego. “X-2” represents the position at which the plane disappeared on this trip up over the hill. Then it circled and came back by the establishment again. And “X-3” is one of the towers of the power line which extends across the Gorge. The entrance to the Gorge is at the extreme left of the picture. There is another tower. The power line would extend across here and there would be a point at which the power line was obscured. In other words, as soon as the plane reached a position about there, it would pass out of sight.

The Court: And that is by reason of this hill here?

Mr. Focht: That is right. From the appearance of these two towers, it would appear that the power line would cross to a position about there.

The Court: Where are the towers?

(Testimony of R. H. Tinkham.)

Mr. Focht: There is one of the towers. If we had a magnifying glass, I think it would be a little easier. Here [56] is the second tower and there are towers on the other side, which do not appear.

The Court: If the plane disappeared—apparently, it disappeared, having gone over the towers, is that correct?

Mr. Focht: The line extends across the valley. Here is the bare tip of another tower on the other side. So the wire slopes there. And there would be a point at which the plane would pass out of vision.

The Court: Yes, but it must have gone over the tower at this point to have cleared——

Mr. Focht: This part of the line but that is not where the line is suspended across the canyon. In other words, if this hill could be removed, you would see the line extended across.

The Court: Was it necessary for him to go over that tower at any point before he disappeared?

Mr. Focht: No, your Honor, that is, if he flew down here, he would be obscured by this hill before he reached the line and towers on this side, as is witnessed by the fact that the line and towers on this side cannot be seen. I think I can perhaps make it more clear through a sketch with the witness Tinkham, Jr. Here are the towers on this side. It comes across here over to the other side of the valley.

The Court: Is this the Gorge?

(Testimony of R. H. Tinkham.)

Mr. Focht: The Gorge is back this way. This is the entrance [57] to the Gorge.

The Court: At all events, that is all you know about it, isn't it?

The Witness: Yes, sir; it is.

Mr. Rosensweig: I have one or two more questions, your Honor.

Cross-Examination

By Mrs. Rosensweig:

Q. Did you have any conversation, Mr. Tinkham, with the people who came and told you that there had been an accident up the valley a bit?

A. They just stopped long enough to say they were certain a plane went down and they drove off.

Q. What did they tell you?

Mr. Focht: That is objected to as hearsay.

Mr. Rosensweig: I will withdraw the question. No further questions.

Mr. Focht: You may step down. Mr. Tinkham, Jr.

KENNETH R. TINKHAM

a witness on behalf of the plaintiff, being previously duly sworn, was recalled and testified further as follows:

Direct Examination

By Mr. Focht:

Q. Mr. Tinkham, for the purpose of the record and for the purpose of illustrating your testimony,

(Testimony of Kenneth R. Tinkham.)

I am going to [58] ask if you will draw a little sketch on this tablet.

Mr. Rosensweig: Draw it on the board.

Mr. Focht: The only trouble is that would require a photograph to get it in the record. We could have a copy made, which we could stipulate is a reasonably accurate copy, on the blackboard, and I would have no objection to that.

Mr. Rosensweig: I believe, your Honor, we will object to the question and to the witness drawing a diagram. The photographs speak for themselves. I see no useful purpose in the witness drawing a diagram that is not drawn to scale, which is his own opinion as to what is there and what isn't there. I am going to object to the question as being highly irregular and incompetent, irrelevant and immaterial.

Mr. Focht: If the court please, it is a well-settled rule of evidence that a witness may draw a sketch or diagram to illustrate his testimony. It is not offered for the purpose of being a scale drawing but purely for the purpose of clarity and the purpose of illustrating his testimony.

The Court: We are just going round and round. You had your opportunity yesterday to present your case and I permitted you to call Mr. Tinkham, Sr., back, and now you want to go back into the main case again. Is that it?

Mr. Focht: It was with counsel's permission to reopen the case.

(Testimony of Kenneth R. Tinkham.)

Mr. Rosensweig: I only agreed to that for certain clarifying [59] questions; not for additional evidence.

Mr. Focht: It is just what this question is, for the purpose of clarification.

Mr. Rosensweig: I object, your Honor——

The Court: What is it you are trying to establish now?

Mr. Focht: The relationship of the power line to the position at which the plane passed out of the sight of the witnesses. It is a very important question in view of the time element involved.

The Court: You may go into that.

Q. (By Mr. Focht): Will you please draw on this piece of paper a sketch showing the section of the valley which contains your business establishment and the Gorge and the power lines and, after you draw it, we will label it for the purposes of illustration. You have mentioned a hill which you have stated, on your examination yesterday, obscured your view. Please draw the hill in. Will you please label Tinkham's Center, if it appears on that diagram, and please label the power line if it appears in the diagram and please label the Gorge. What does this line represent?

A. That is the highway.

Q. Please label that "highway." Please label the hill. Is that the hill that you have referred to as obscuring your vision of a portion of the power line?

A. Yes, sir. [60]

(Testimony of Kenneth R. Tinkham.)

The Court: First, you might have him draw the diagram and then have him mark each place and inquire about it, so we will have something in the record.

Q. (By Mr. Focht): Will you please place north at its directional point on the map? You have now marked on this paper, upon the plat that you have drawn, Tinkham's Center. Does that represent—

Mr. Rosensweig: May I see the diagram first?

Mr. Focht: Surely.

The Court: You might mark on there also the course of the plane, with arrows; when it first came up the canyon and then when it came back again and went back towards San Diego.

Mr. Focht: Very well, sir.

Q. In response to the court's suggestion, will you please mark the course of the plane as it came up the valley and then as it came back?

The Court: With arrows.

Q. (By Mr. Focht): With arrows, so that we can indicate its direction.

The Court: So we can follow its course.

Q. (By Mr. Focht): Can you extend the shaft of the arrow a little further in each case? Does the rectangle marked with the legend "Tinkham Center" represent the establishment where you were when you saw the plane, according to your testimony? [61] A. Yes, sir.

(Testimony of Kenneth R. Tinkham.)

Q. And the Gorge to which you have referred in your testimony is marked with the legend "Gorge" on the map? A. Yes, sir.

Q. And "valley" represents what?

A. The valley, with the riverbed in it.

Q. Mission Valley? A. Yes, sir.

Q. And you have labeled "power line" on the legend as representing the power line which you have mentioned in your testimony?

A. Yes.

Q. And the semi-circle marked "hill" is the hill that you have mentioned as obscuring your vision of the plane after it returned on its way to San Diego? A. Yes, sir.

Q. And the line of arrows which points in a generally easterly direction represents what?

A. The plane going out.

Q. That is, the plane going away from San Diego? A. Yes, sir.

Q. The line of arrows in a general westerly direction represents what?

A. The plane returning.

Mr. Focht: We will offer this in evidence for the purpose [62] of illustrating the witness' testimony.

The Court: It may be received and marked Plaintiff's Exhibit 3.

Q. (By Mr. Focht): Approximately how far were the power lines from the position of the plane where it passed, when it passed, out of your sight on the way towards San Diego?

(Testimony of Kenneth R. Tinkham.)

Mr. Rosensweig: We object to that question as calling for the conclusion of the witness.

Q. (By Mr. Focht): If you can give us a fair estimate.

The Court: If he knows.

A. From the plane, that would pass over the power lines.

Q. (By Mr. Focht): From the place where the plane left your sight to the position where it would be even with the power lines?

The Court: Do you mean where the accident occurred?

Mr. Focht: Yes.

A. I would say around five or six hundred feet.

Q. After the plane passed out of your vision, in what direction were you looking?

A. We watched that direction to see if it came up.

Q. Did you see it come up? A. No, sir.

Q. On cross-examination, counsel for the government [63] asked you if you had seen planes flying up Mission Valley. I will ask you if you have ever seen any planes, prior to this one, flying in or out of the Gorge? A. No, sir.

Mr. Focht: You may cross-examine.

Cross-Examination

By Mr. Rosensweig:

Q. After the plane, Mr. Tinkham, disappeared around these hills, you didn't see it thereafter, did you? A. No, sir.

(Testimony of Kenneth R. Tinkham.)

Q. How soon after the accident did you arrive at the scene?

A. I didn't go down for at least an hour.

Mr. Rosensweig: No further questions.

Mr. Focht: Just a moment. The court may have some questions.

The Court: Does the Gorge dip at the point where you say the plane was headed in that direction, after it disappeared from view, or do you know? A. You say does it dip?

The Court: Yes.

A. No; it does not dip, not right at that point, very much. It starts to go down.

The Court: How far could you see in that direction before it disappeared, before the plane disappeared? [64]

A. About three-quarters of a mile. You can see it just as it starts down that Gorge and, when it goes behind that hill, you can't see it.

The Court: How did you hear of the crash? You say somebody came along? A. Yes, sir.

The Court: And nothing was called to your attention in the way of any noise or anything of that kind? A. You couldn't hear it.

The Court: You couldn't hear the crash?

A. No.

The Court: You couldn't hear any electrical disturbance? A. No, sir.

The Court: That is all.

Mr. Rosensweig: Step down.

Mr. Focht: May these witnesses be excused?

The Court: Yes.

Mr. Focht: We again rest, your Honor. Before replying to counsel's motion for a dismissal, perhaps counsel wishes to add to it because there has been additional testimony.

Mr. Rosensweig: I don't believe, your Honor, that I have anything further to add to what I said yesterday.

Arguments by Counsel

The Court: I could take this under submission but I have an impression, gained from the arguments and the briefs and the evidence, and they are all fresh in my mind. I have in mind the general rule of law that it is incumbent upon you to prove your case by a preponderance of the evidence. You are suing for negligence on the part of the operator of this plane. You must prove your case in this instance as in the general run of cases. You have only an inference based on the fact that he was traveling at the altitude to which the witnesses have testified. I am not sure that it is a violation of the rules, assuming the fact to be true that he was traveling at that low altitude. We have come to the point now where I would have to do a lot of guessing if I would conclude it was negligence on his part to travel at that height. We get to the point now where the plane disappears from view, out of sight, of all of the witnesses.

Undoubtedly, the plane came in contact with the power lines. How that happened nobody knows. If he was flying at a low altitude, in contravention of the Civil Aeronautics rule, before he disappeared from view—I can't say at that time, at the time of the accident, that he was flying at that low altitude. There is nothing in the evidence to that effect. I don't know that I can carry any such inference to the extent that you argue I should carry it. He might just as well have been up a thousand or two thousand feet at that point. There is evidence here that he did fly, in his flight, back and forth over these hills but that, of course, has nothing [66] to do with this particular moment. I am not so sure but what one witness stated that he went over this hill and another witness stated he went around it, before he disappeared from view. I will look at my notes here. The witness Kenneth Tinkham stated that, when he went up, going up the river area there, his plane was raised over the hill and then he went up in a northerly direction, at the point that he marked "X-2," the point where the plane changed course and went north and out of sight. Whether he intended to convey the meaning that he went over this hill on the way back or not I don't know, but he said he followed the same course. So, if he did, before he disappeared from view, he must have gone over the hill.

Mr. Focht: I believe, your Honor, he was referring to the hill to the north, where he made his turn.

The Court: He said on the return trip he returned on the same route. We are still speculating as to what happened at the time of the accident and I don't think that I can carry the inference that you suggest. In other words, I think it is your function to show negligence at the time when he disappeared from view. Nobody saw the accident. And, in view of my notion that I am not so sure that he was violating this rule in flying at that altitude, in that uninhabited area, I am going to sustain the motion of the defendant in this case. Will you prepare the order? [67]

Mr. Rosensweig: Yes, your Honor; I will prepare the order as soon as I get back to Los Angeles and submit it to counsel as to form and substance.

The Court: We will stand adjourned. [68]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 11th day of February, A. D., 1948.

/s/ ROSS REYNOLDS,
Official Reporter.

[Endorsed]: No. 11905. United States Circuit Court of Appeals for the Ninth Circuit. San Diego Gas & Electric Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division.

Filed April 22, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11905

SAN DIEGO GAS & ELECTRIC COMPANY, a
corporation, Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD FOR PRINTING

Comes now the appellant in the above entitled cause and hereby adopts as its statement of points on which it intends to rely on this appeal the statement of points on appeal as it now appears in the transcript of the record herein.

Appellant hereby designates for printing the entire certified transcript of the record save and except that portion thereof which contains Plaintiff's Exhibits 1 and 2.

Dated this 27th day of April, 1948.

LUCE, FORWARD, LEE &
KUNZEL,

By /s/ JAMES L. FOCHT, JR.

Attorneys for Appellant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 29, 1948.

